

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BABY GIRL, INC.	:	DETERMINATION
	:	DTA NO. 819323
for Redetermination of Exempt Organization Status	:	
under Articles 28 and 29 of the Tax Law	:	

Petitioner, Baby Girl, Inc., c/o Idrissa Sparks, 3230 Cruger Avenue, Apt. 4M, Bronx, New York 10467, filed a petition for redetermination of exempt organization status under Articles 28 and 29 of the Tax Law.

On April 24, 2003, the Division of Taxation filed a motion for an order (i) granting summary determination and denying the petition and (ii) imposing a \$500.00 penalty for the filing of a frivolous petition. Petitioner filed no response to the motion. Accordingly, the 90-day period for the issuance of this determination began on May 27, 2003, the due date for petitioner's response.¹ The Division of Taxation appeared by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel). Based on the pleadings and motion papers, Frank W. Barrie, Administrative Law Judge, renders the following determination.

¹ Pursuant to General Construction Law § 25-a, when any period of time, computed from a certain day, within which an act is required to be done, ends on a Saturday or a Sunday or a holiday, such act may be done on the next succeeding business day. The 30-day period for petitioner to respond to the Division's motion ended on Saturday, May 24, 2003. Therefore, petitioner had until Tuesday, May 27, 2003 (Monday, May 26, 2003 was Memorial Day) to submit a response.

ISSUES

I. Whether the Division of Taxation is entitled to summary determination and denial of the petition on the grounds that petitioner is a for-profit business corporation which refused to submit required documents in support of its application for an exempt organization certificate.

II. Whether the maximum penalty of \$500.00 for the filing of a frivolous petition should be imposed upon petitioner.

FINDINGS OF FACT

1. Idrissa Sparks, in her stated capacity of “Governess,” filed a form ST-119.2, Application for an Exempt Organization Certificate, dated April 18, 2002 on behalf of petitioner, Baby Girl, Inc., claiming exempt status as a “trust” organized and operated exclusively for “religious” purposes.

2. By a letter dated April 24, 2002, the Division of Taxation (“Division”) returned the Application for an Exempt Organization Certificate to petitioner as being incomplete. This letter advised petitioner that “documents are missing and must be included with the application before we can review it.” Further, petitioner was provided with the phone number for the unit within the Division known as Sales Tax Exempt Organizations, “If you have any questions” The following specific documents were requested: (i) a copy of the organization’s creating instrument with a copy of any amendments to it, (ii) a copy of the filing receipt for the organization’s certificate of incorporation, (iii) a copy of the organization’s bylaws or other rules for its operation, (iv) a detailed description of all activities and programs that the organization has engaged in and is planning, (v) a statement of the organization’s receipts and expenditures, in accounting form, for its most recent fiscal year of operation, and (vi) a complete statement of the organization’s assets and liabilities, in accounting form, for its last fiscal accounting period.

In addition, the Division provided petitioner with form ST-119.2-I, Instructions for Form ST-119.2 Application for an Exempt Organization Certificate. These instructions are detailed and provide guidance on the organizational and operational requirements that an applicant must meet in order to obtain tax exempt status.

3. By a letter dated April 26, 2002, petitioner resubmitted its application without any of the additional documentation requested by the Division providing the following explanation²:

This letter is written to inform you that I am unable to provide the information requested in the attached letter however, the information requested is on file with the Internal Revenue Service, Exempt Organizations in Cincinnati Ohio. Please request the information from the IRS and process the attached application.

4. The Division investigated petitioner's tax exempt status by researching the records of the Division of Corporations of the New York State Department of State and determined that Baby Girl, Inc. was a domestic business corporation, not a not-for-profit corporation. Further, the Division contacted the Exempt Organization Determinations unit of the Internal Revenue Service and was advised that petitioner was not exempt.

5. By a letter dated May 15, 2002, petitioner was advised by the Division that "*in order to receive a ruling on its status for exemption* [emphasis in original]," the sales and use tax regulations require that the information as detailed in Finding of Fact "2" (which was again set forth in this follow-up letter) be provided. In addition, petitioner was provided, likewise once again, with the name and phone number of an individual to contact within the Division's Exempt Organizations Unit.

² Punctuation in this "explanation" has not been corrected.

6. By a letter dated May 20, 2002, petitioner, ignoring the Division's instructions, merely restated that it did not have the requested documentation and all the information was with the IRS in Cincinnati, Ohio.

7. In response, the Division issued a letter dated May 29, 2002 denying petitioner's request for tax exempt status. This letter explained in relevant part as follows:

[I]t is necessary to file a completed application with all of the required supporting documents . . . and prove that [petitioner] meets the statutory requirements.

* * *

Information available to us indicates that your corporation was incorporated under the Domestic Business Corporation Law, rather than organized and operated exclusively as a nonprofit religious corporation of which no part of its net earnings or assets inure to the benefit of any private shareholder or individual. The Business Corporation Law provides for the distribution of income to shareholders as well as for the distribution of assets to shareholders and private individuals upon dissolution of a corporation.

8. Petitioner filed a request for conciliation conference and subsequently appeared at a conciliation conference by its president, Idrissa Sparks, on November 20, 2002. By a conciliation order dated January 10, 2003, the Division's denial of exempt organization status was sustained. Petitioner provided no documents or other evidence to support its claimed status as an exempt organization during the conference stage.

9. Petitioner filed a petition dated January 20, 2003 alleging that the Division erred in denying it exempt organization status. It asserted that it was a "non-stock/ not-for-profit organization." Once again, it claimed that the IRS in Cincinnati, Ohio had a copy of its documents. Although it noted that the Department of State did not have "a record of Articles of Incorporation for Baby Girl, Inc. filed under the not-for-profit corporation law," it asserted that it sent such articles with the appropriate fee to the Department of State.

10. In its answer dated March 6, 2003, the Division, in addition to denying petitioner's allegations noted above, affirmatively requested the imposition of a penalty of \$500.00 for the filing of a frivolous petition.

CONCLUSIONS OF LAW

A. Tax Law § 1116(a)(4) provides tax exempt status to a corporation for sales and use tax purposes if it is "organized and operated exclusively" for an exempt purpose. Among the exempt purposes enumerated in section 1116(a)(4) are "religious," "charitable," "scientific" and "educational."

B. The pivotal fact in this matter, which lends support to the Division's motion for summary determination, is that petitioner, as detailed in Finding of Fact "4", was a domestic business corporation. The allegation in the petition that it was a "non-stock/ not-for profit organization" is just that, an allegation. At no time has petitioner presented any evidence to support such allegation. The Findings of Fact delineate the many opportunities provided to petitioner to submit such evidence and the clear direction by the Division that it was required to provide such evidence in order to obtain tax exempt status. Moreover, petitioner failed to respond to the motion at hand, and it is therefore deemed to have conceded that no question of fact exists which would require a hearing to resolve (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325, *appeal dismissed* 62 NY2d 942).

C. Consequently, a motion for summary determination may be granted since the record sufficiently establishes that "no material and triable issue of fact is presented" concerning petitioner's eligibility for tax exempt status (20 NYCRR 3000.9[b][1]). As a domestic business corporation, it is not eligible for such status.

D. Pursuant to Tax Law § 2018, if a petitioner's position in a Division of Tax Appeals proceeding is frivolous, a penalty of not more than five hundred dollars may be imposed by the Tax Appeals Tribunal. The Tribunal recognized in *Matter of Ellett* (October 18, 2001) that an administrative law judge is authorized to impose a penalty against a petitioner for maintaining a frivolous position in an appropriate case, in light of Tax Law § 2010(1) which authorizes administrative law judges "to conduct any hearing or motion procedure authorized to be held within the division of tax appeals."

E. In both *Matter of Thomas* (Tax Appeals Tribunal, April 19, 2001) and *Matter of Ellett* (*supra*), the *maximum* penalty for maintaining a frivolous position of \$500.00 was imposed. However, in these matters, the petitioners were maintaining the patently frivolous position that their wages were not taxable as income. Further, the Tax Appeal Tribunal's Rules of Practice and Procedure at 20 NYCRR 3000.21 specifically used "wages are not taxable as income" as an example of a frivolous position along with the following four other examples of frivolous positions: (i) petitioner is not liable for income tax because petitioner has not exercised any privileges of government, (ii) the income tax system is based on voluntary compliance and petitioner therefore need not file a return, (iii) federal reserve notes are not 'legal tender' or 'dollars' and petitioner therefore cannot measure his or her income, and (iv) only states can be billed and taxed directly. In contrast, in the matter at hand, it was petitioner's irresponsibility and carelessness in continuing to maintain a position, despite being advised on a number of occasions that it needed to provide proof of its non-profit status, that supports the imposition of penalty. Petitioner's failure to bring forth such evidence, despite such instruction, transformed its position into a frivolous one, especially so when it continued to assert such unsupported allegation of non-profit status by filing a formal petition. This intransigency, which wasted the

resources of the Division of Taxation and the Division of Tax Appeals, justifies the imposition of a penalty for maintaining a frivolous position in the lesser amount of \$100.00.

F. The motion of the Division of Taxation for an order of summary determination is granted, the petition of Baby Girl, Inc. is denied, and a penalty pursuant to Tax Law § 2018 and 20 NYCRR 3000.21 in the amount of \$100.00 is hereby imposed.

DATED: Troy, New York
August 7, 2003

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE